Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1412

HUEY P. NEWTON and ROBERT L. BAY,
Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Superior Court of the State of California,
Appellate Department, Alameda County

GARRY, DREYFUS, MCTERNAN & BROTSKY,
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SUPERIOR COURT OF THE STATE OF CALIFORNIA,
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PETITION FOR A WRIT OF CERTIORARI
to the Superior Court of the State of California,
Appellate Department, Alameda County

Petitioners Huey P. Newton and Robert L. Bay respectfully pray that a writ of certiorari issue to review the judgment of the Superior Court of the State of California in and for the County of Alameda, Appellate Department, entered on January 24, 1973.

DECISIONS BELOW

The judgment of the Appellate Department affirmed an order dated September 5, 1972 of the Municipal Court, Criminal Division, for the Oakland-

Piedmont Judicial District, County of Alameda, denying petitioners' Motion to Suppress Evidence pursuant to California Penal Code §1538.5. No written opinion was rendered by either court. The Municipal Court Order appears in the Appendix hereto as "Exhibit A". The judgment of the Superior Court, Appellate Department, appears in the Appendix as "Exhibit B". Petitioners filed a petition asking the Superior Court to certify its judgment on appeal to the California Court of Appeal for review. That petition was denied February 9, 1973. The denial appears in the Appendix as "Exhibit C".

JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1247(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The judgment of the Superior Court, Appellate Department, was entered on January 24, 1973. The Appellate Department denied certification to the Court of Appeal on February 9, 1973. This decision was made by the highest court in California in which a decision could be had on a Motion to Suppress Evidence in the trial court, pursuant to California Rules of Court 62(a) and 107 and California Penal Code §1538.5(j). (Rules 62(a) and 107 appear in the Appendix hereto as "Exhibit D"; the pertinent part of the text of California Penal Code §1538.5 appears in the Appendix as "Exhibit E".)

> "No further remedy by way of appeal is available after decision of the superior court or appellate department (whether or not a trial de novo is had) unless, in accordance with rules promulgated by the Judicial Council, the Court of Appeal orders the case transferred to itself upon certification by the superior court, or determination by the Court of Appeal itself, that such transfer 'appears necessary to secure uniformity of decision or to settle important questions of law.' (Code of Civ. Proc. §988t; Pen. Code, §1471; People v. Allenthorp, supra, 64 Cal.2d 679, 682; see also Cal. Rules of Court, rules 62 and 63.)" *Whittaker v. Superior Court of Shasta County* (1968) 68 C.2d 357.

When the appellate department of the Superior Court affirms the judgment of the municipal court without publishing an opinion or certifying the case to the Court of Appeal, review by the State Supreme Court is not available. *White v. Superior Court* (1925) 72 C. 71[illegible]; *In re Sterling* (1965) 63 C.2d 486.

California Penal Code §1538.5(j) specifically provides for an appeal of a denial of a motion to suppress evidence relating to a misdemeanor complaint by a municipal court to the superior court of the same county, which appeal shall be binding on appellant.

QUESTION PRESENTED

Does the warrantless search of the contents of a briefcase made at the time of an arrest pursuant to an arrest warrant for an alleged misdemeanor, in the absence of exigent circumstances, violate the Fourth and Fourteenth Amendments of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Fourteen, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourth Amendment is made applicable to the states by the Fourteenth *(Mapp v. Ohio* (1961) 367 U.S. 643).

STATEMENT OF THE CASE

On April 27, 1972 at 4:00 p.m., Robert L. Bay and Huey P. Newton were arrested in the area of defendant Newton's residence at 1200 Lakeshore Avenue, Oakland, California, while riding in an automobile, pursuant to misdemeanor arrest warrants charging them with violations of California Penal Code §542 (battery) and §417 (brandishing a firearm). Bay was also charged with carrying a concealed weapon on his person.

The alleged violations occurred on April 16, 1972, five days before a report was made to the police, eleven days before the arrest warrants were issued and executed.

When the vehicle was stopped, Bay occupied the driver's seat and Newton the right rear seat. Arresting Officer Farkas approached Bay and ordered both Bay and Newton to get out of the car, which they promptly did. Between the time the officer approached Bay and the time Bay got out of the car his hands remained on the steering wheel. Neither Bay nor Newton made any furtive or suspicious movements.

While removing Bay from the car, Officer Farkas testified that he saw a black vinyl case on the floor

of the car, protruding from the driver's seat, and that after both Bay and Newton had gotten out of the car and were under the control of six other police officers, he removed the case and searched it without a search warrant. (Reporter's Transcript, Hearing on California Penal Code §1538.5 Motion, pp. 8, 11.) Inside the case, the officer allegedly found a loaded 9mm. handgun. As a result of the search of the black vinyl case, Bay and Newton were charged with misdemeanor violations of California Penal Code §12025 (carrying a concealed weapon in a vehicle) and §12031 (carrying a loaded firearm).

On the basis of these facts petitioners filed a Motion to Suppress Evidence pursuant to California Penal Code §1538.5 with the Municipal Court for the Oakland-Piedmont Judicial District, Alameda County. This motion charged that the search and seizure were made in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

I. THE WARRANTLESS SEARCH OF THE BLACK VINYL BRIEFCASE VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS.

A search not made pursuant to the authority of a search warrant is presumptively invalid. The courts have long recognized that the protections provided by the Fourth Amendment comprise one of the keystones of a democratic society:

> "Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its

> recognition of individual freedom. That safeguard has been declared to be 'as of the very essence of constitutional liberty', the guaranty of which 'is as important and as imperative as are the guarantees of the other fundamental rights of the individual citizen' (citation). . . . 'The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted' (citation)." *Ker v. State of California* (1963) 374 U.S. 23.

The burden of justifying a warrantless search falls upon the prosecution. *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 455; *U.S. v. Jeffers* (1951) 342 U.S. 48, 51.

The general rule that warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment is subject only to a few exceptions. *Katz v. U.S.* (1967) 389 U.S. 347, 357. "The exceptions are zealously and carefully drawn," *Jones v. U.S.* (1959) 357 U.S. 493, and there must be "a showing by those who seek exception . . . that the exigencies of the situation made that course imperative." *McDonald v. U.S.* (1948) 335 U.S. 451, 456.

II. THIS CASE DOES NOT FALL INTO ANY OF THE EXCEPTIONS TO THE REQUIREMENT OF A SEARCH WARRANT.

A. The Gun Was Not In "Plain View".

One of the exceptions to the requirement of a warrant to search is the "plain view" doctrine. The term

"in plain view" means open and visible to the naked eye. The plain view of a merely suspicious looking or unusual object which itself is not contraband does not justify its seizure without a warrant. In *Peo. v. Marshall* (1968) 69 Cal.2d 51, 58-59, the California Supreme Court held that the police could not search a closed paper bag visible on the floor of defendant's closet because the contraband itself was not in plain view:

> "In the present case the brown paper bag itself was not contraband. Only by prying into its hidden interior (citation) could the officer be sure that he was seizing contraband and nothing more. The fact that the container was only a brown paper bag instead of a packing box, purse, handbag, briefcase . . . is immaterial. It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a warrant."

The "plain view" doctrine has no application to this case.

Furthermore, even if applicable, "plain view *alone* is never enough to justify the warrantless seizure of evidence." *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 468; *Johnson v. U.S.*, 333 U.S. 10; *Trupiano v. U.S.* (1947) 334 U.S. 699. In each case, the search must also be justified by a warrant or by an exception such as hot pursuit. *Coolidge, supra.*

B. There Was No Probable Cause To Search Defendants' Automobile Or The Briefcase.

"Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search." *Chambers v. Maroney* (1970) 399 U.S. 42, 51. Probable cause alone is never enough to justify a warrantless search. *Chapman v. U.S., infra,* p. 613; *Agnello v. U.S.* (1925) 269 U.S. 20, 33. In certain circumstances automobiles involved in felony violations may be searched without a warrant on the rationale that the evidence may disappear before a search warrant could be obtained because of the mobile nature of automobiles. The Supreme Court has made it clear, however, that the "auto rule" does not countenance the flouting of constitutional protections: "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 461. The cases tolerating warrantless auto searches have "always insisted that the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime before they begin their warrantless search." *Dyke v. Taylor,* 391 U.S. 216, 221. Thus, the essential threshold test of the legality of an auto search is the presence or absence of probable cause that the automobile searched contains contraband. *Carroll v. United States* (1924) 267 U.S. 132, 155. In *Carroll,* and other prohibition liquor cases,

> "[a]n automobile . . . was an almost indispensable instrumentality in large-scale violation of

> the National Prohibition Act, and the car itself therefore was treated somewhat as an offender and became contraband itself." *United States v. Di Re,* 332 U.S. 581, 587.

In *Chambers v. Maroney* (1970) 399 U.S. 42, probable cause was supplied by an eyewitness report of an armed robbery which "furnished detailed descriptions of the articles stolen, the garb and weapons of the robbers, and the appearance of the getaway car; and shortly thereafter, the defendants were arrested in a vehicle precisely matching that description."

In cases like the one at hand, where auto searches were conducted without probable cause, the searches have been held unconstitutional. In *Preston v. United States* (1964) 376 U.S. 364, three men were arrested in an auto for vagrancy. A delayed search of the auto was invalidated. A later discussion of the case by the Supreme Court held that, since the arrest was for vagrancy, "it was apparent that the officer had no cause to believe the evidence of a crime was concealed in the auto." *Chambers, supra* at 47. In *Dyke, supra,* a general description of an automobile from which shots had been allegedly fired did not give officers probable cause to search a "suspicious car" which raced away when they began to follow it. The Court held that the evidence failed to show that the officers "had reasonable or probable cause to believe that evidence would be found in petitioner's car." (p. 221). Where officers are not responding to an emergency there must be compelling reasons and exceptional circumstances to justify a search in the absence of a

search warrant. *McDonald v. U.S., supra,* pp. 454-455; *Coolidge v. New Hampshire, supra,* p. 461.

Warrantless searches are justified where there is consent, *Zap v. U.S.,* 328 U.S. 624 (1945); or probable cause and an emergency, *U.S. v. Jeffers,* 342 U.S. 52 (1951); or hot pursuit of a fleeing felon, *Johnson v. U.S.,* 333 U.S. 10 (1947); or goods in the process of imminent destruction, *Schmerber v. California,* 384 U.S. 757 (1965); or immediate disappearance, *Chapman v. U.S.,* 365 U.S. 610 (1960); or furtive gestures of the occupants of an automobile, *Sibron v. New York,* 392 U.S. 40 (1968).

However, none of the circumstances justifying probable cause to search an automobile without a warrant existed in the present case. Petitioners were arrested on a misdemeanor warrant based on activity which allegedly occurred eleven days prior to its issuance and execution. The fact that the arrest occurred while petitioners were in the vehicle is entirely fortuitous. They were arrested as they were driving in an ordinary manner near Newton's residence. There was no consent to this search; there was no emergency; no hot pursuit; no goods in the process of imminent destruction or disappearance; nor were any furtive gestures made by any of the occupants of the automobile.

The Court in *Chambers, supra,* p. 48, held that an automobile can be searched on probable cause only where a search warrant is impracticable or the automobile itself is in evidence. The automobile in the present case was in no way connected with the in-

cident alleged and could not conceivably be considered an instrument thereof. Nor was a search warrant impracticable since information concerning the vinyl case was allegedly given to the arresting officer six days prior to the arrest.

C. There Were No Circumstances Justifying A Search Incident To Arrest.

Another exception to the requirement for a search warrant is a search incident to arrest. *Chimel v. California* (1969) 395 U.S. 752. However, searches incident to arrest are limited both as to time and place. *Chimel,* p. 763, held that the arresting officer may conduct "a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." With specific regard to weapons, both federal and state courts have held that warrantless searches for weapons incident to arrest are justified only where the officer has "reasonable grounds to believe that he is in danger of bodily harm or injury." *Grundstrom v. Beto* (D.C. Tex. 1967) 273 F.Supp. 912, 917; *U.S. v. Tate* (1962 D.C. Del.) 209 F.Supp. 762; *Peo. v. Superior Court* (1972) 7 C.3d 186, 202; *Peo. v. Marsh* (1967) 281 N.Y.S.2d 789. The court in *Grundstrom, supra,* said that:

> "To permit all searches incidental to an arrest to be justified on the theory that the officer is searching for weapons would be to allow wholesale fishing expeditions whenever a legal arrest is made."

In *Tate* the defendant was already out of the car and in the custody of police officers when the illegal search was made. Exactly as in the present case, both defendants were outside the car and in the custody of six police officers when the arresting officer removed and searched the briefcase. Under these circumstances, neither of the defendants was in any position to harm anyone or effect an escape with the weapon.

Assuming, arguendo, that the seizure of the briefcase was proper, it is still clear that a warrant was required to search its interior. The basic premise articulated in *Katz v. U.S.* (1967) 389 U.S. 347, 351, that "wherever an individual may harbor a reasonable 'expectation of privacy' he is entitled to be freed from unreasonable governmental intrusion" is directly applicable in the present case. Petitioners, at the time of the arrest, were in the privacy of their automobile, driving in a normal manner in the daytime near the residence of one of them and had a right to expect that the contents of a briefcase located in that car was within the zone of protected privacy.

In a case directly analogous to the present one, *Mozetti v. Superior Court* (1971) 4 C.3d 699, the California Supreme Court held the search of a closed suitcase located on the back seat of defendant's car without a search warrant was invalid because the search was within the zone of reasonable expectation of privacy. See also *Terry v. Ohio* (1968) 392 U.S. 1, 19. The rule in *Chimel, supra,* limiting the scope of a search incidental to an arrest to the area immediately

within the defendant's control and the rule in *Katz* protecting the zone of reasonable expectation of privacy are controlling in this case.

III. THE WARRANTLESS SEARCH OF THE BRIEFCASE WAS INVALID BECAUSE IT WAS NOT IMPRACTICABLE TO OBTAIN A SEARCH WARRANT.

The arresting officer testified at the hearing in the trial court that the complainant told him on making the report, six days before the arrest warrant was issued and executed, that petitioner Bay carried a firearm in a black vinyl case (Reporter's Transcript 22, 23).

Where it is not impracticable to obtain a search warrant, the Fourth Amendment prohibits a search without one, *Chambers, supra; Coolidge v. New Hampshire, supra,* p. 468; *Vale v. Louisiana* (1970) 399 U.S. 30. In *Vale,* the Court held that since the officers were able to procure two warrants for Vale's arrest and had information that he was residing at the address where they found him, there was no reason to believe that it was impracticable for them to obtain a search warrant as well and that therefore the warrantless search was invalid. Likewise, in *Trupiano v. U.S.* (1947) 334 U.S. 699, the court held that despite the fact that contraband was in plain view at the time of the arrest its seizure was unlawful because the arresting officers had ample opportunity to procure a search warrant and failed to do so. Although the Court in *U.S. v. Rabinowitz* (1949) 339 U.S. 56, 66, limited the rule in *Trupiano,* it limited it only to

the extent that a search warrant is required *solely* on the basis of practicality, rather than on the reasonableness of the search. Furthermore, *Chimel, supra,* overruled the broad justification in *Rabinowitz* that a search merely be reasonable and required that it must also be narrowly limited in scope. Inasmuch as the warrantless search in the present case was unreasonable, beyond the permissible scope, and a search warrant would not have been impractical to obtain, the search violated the requirements of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari must issue to review the judgment of the Appellate Department of the Superior Court in and for the County of Alameda, State of California. The judgment of that Court should be reversed and the evidence obtained by the warrantless search of defendants' automobile and briefcase must be suppressed.

Dated, San Francisco, California,
April 12, 1973.

Respectfully submitted,
GARRY, DREYFUS, MCTERNAN & BROTSKY,
By CHARLES R. GARRY,
Counsel for Petitioners.

(Appendix Follows)

APPENDIX

Exhibit A

Municipal Court for the Oakland-Piedmont
Judicial District, County of Alameda
State of California

People of the State of California, Plaintiff(s) vs. Robert L. Bay and Huey P. Newton, Defendant(s) (Abbreviated Title)	No. 25282-9A 25282-9B 25712-5A 25712-5B

NOTICE OF HEARING

To each party and to the attorney(s) of record for each party herein:

Notice is hereby given that Motion under 1538.5 PC is DENIED. It is further ordered that the above entitled cases are set for hearing on September 11, 1972 at 10 a.m., in Department 11 of this Court, at Municipal Court Building, 600 Washington Street, Oakland, California 94607.

Dated: Sep. 5, 1972

George R. Dickey, Clerk
By /s/ R. Taylor RT
Deputy Clerk

Exhibit B

Superior Court of the State of California
In and for the County of Alameda

Action No. 637

People of the State of California,
Plaintiff and Respondent,
vs.
Huey P. Newton and Robert L. Bay,
Defendants and Appellants.

CLERK'S NOTICE in re RULING

In the above entitled action pending in Appellate Department, you are hereby notified that this action having been heretofore argued and submitted on January 19, 1973, comes now the Court and orders: Order on Appeal affirmed. Remittitur to issue.

Date January 24, 1973

Jack G. Blue, County Clerk
By: Guin Holley
Deputy

(Endorsed) Filed January 24, 1973 Jack G. Blue, County Clerk; By: Guin Holley, Deputy

Exhibit C

Superior Court of the State of California
In and for the County of Alameda

Action No. 637

People of the State of California,
Plaintiff and Respondent,
vs.
Huey P. Newton and Robert L. Bay,
Defendants and Appellants.

CLERK'S NOTICE in re RULING

In the above entitled action pending in Appellate Department, you are hereby notified that the Court having rendered judgment on January 24, 1973 and the Appellant having submitted a Petition for Certification to the District Court of Appeal, and the same having been taken under advisement and fully considered, comes now the Court and orders: Said Petition denied.

Date February 9, 1973

Jack G. Blue, County Clerk
By: Rhoda Ellenbogen
Deputy

(Endorsed) Filed February 9, 1973, Jack G. Blue, County Clerk; By: Rhoda Ellenbogen, Deputy

Exhibit D

CALIFORNIA RULES OF COURT

Rule 62. Transfer

(a) [Cases transferable] A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

Rule 107. Rehearing and Finality of Judgments

(a) [Time for rehearing] At any time before a judgment of an appellate department becomes final, as hereinafter provided it may vacate such judgment and order a rehearing.

(b) [When judgment becomes final] Unless a rehearing shall be so ordered, every judgment of an appellate department shall become final as follows:

(1) Upon the expiration of seven days after the same shall have been pronounced, unless one or more petitions for a rehearing shall have been filed within said period of time;

(2) If one or more petitions for a rehearing shall have been filed within said time, then upon the expiration of 30 days after such judgment shall have

been pronounced, if such rehearing shall not meanwhile have been granted, or upon the denial of all such petitions if all shall be sooner denied.

(3) Where the judgment is modified before it becomes final, as above provided, the period specified herein begins to run anew, as of the date of modification; but a change of the opinion without modification of the judgment does not postpone the time when the judgment becomes final.

(c) [Petition, answer and determination] A petition for a rehearing must be served on all adverse parties before filing, and filed within seven days after the judgment shall have been pronounced, and shall not be filed unless accompanied by due proof of such service. An answer to any such petition may be served on the petitioning party and filed, if accompanied by due proof of such service, within three days after service of such petition. If a rehearing be ordered, the appellate department may place the case on the calendar for further argument or submit it for decision.

(d) The periods of time specified in this rule shall be computed as provided in the Code of Civil Procedure, and extended in the cases and to the extent specified by section 12a of said code, but shall not be otherwise extended.

Exhibit E

**CALIFORNIA PENAL CODE §1538.5—
MOTION TO SUPPRESS EVIDENCE:**

(j) Relitigation of question after grant of motion; new evidence, review.

. . . If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court provisions governing appeals from municipal and justice courts in criminal cases.

FILE COPY

FILED

JUN 28 1973

MICHAEL RODAK, JR., CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1972

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Petitioners,

vs.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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Chief Assistant Attorney General—Criminal Division

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ROBERT R. GRANUCCI
Deputy Attorney General

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Deputy Attorney General

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§1538.5 2,5
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§12025 2,3
§12031 2

28 United States Code:

§1257 4,6
§1257(3) 1,4

California Statutes, 1967 Chapter 1537, p. 3652, §1 .. 4

In The Supreme Court Of The United States

OCTOBER TERM, 1972

NO. 72-1412

HUEY P. NEWTON
and ROBERT L. BAY,
Petitioners,

vs.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO
PETITION FOR WRIT OF CERTIORARI

PROCEEDINGS BELOW

The judgment that the petitioners seek reviewed was entered by the appellate department of the Alameda County Superior Court on January 24, 1973 (Pet., Exh. 3). Certification to the California Court of Appeal was denied on February 9, 1973 (Pet., Exh. C).

JURISDICTION

The petitioners invoke the jurisdiction of this Court under title 28, United States Code, section 1257(3).

QUESTIONS PRESENTED

1. Whether the case is properly before this Court.

2. Whether an officer serving an arrest warrant for, *inter alia*, carrying a concealed weapon may remove from the arrestee/driver's side of the car a case from the floor of the car between the arrestee's feet and, feeling a bulky object like a weapon, may open the case and remove the weapon when he has previously been told the arrestee carried the weapon in just such a case.

STATEMENT OF THE CASE

The petitioners were charged in Municipal Court of the State of California, Oakland-Piedmont Judicial District, Alameda County, with violations of California Penal Code sections 12025 (carrying a weapon concealed) and 12031 (carrying loaded firearms) (Pet., p. 5). A hearing to suppress evidence under California Penal Code section 1538.5 was held on August 17, 1962, and denied on September 5, 1972 (Pet., Exh. A).

Petitioners appealed this denial of their motion to the appellate department of the Superior Court of Alameda County, California. The municipal court order was affirmed on January 24, 1972. Certification to the California District Court of Appeal was denied on February 9, 1973 (Pet., Exh. C). A petition for stay was presented to Mr. Justice Douglas on April 20, 1973, and denied. The petition for writ of certiorari was filed on April 18, 1973, and opposition was requested on May 31, 1973.

The case is set for trial on August 22, 1973.

STATEMENT OF FACTS

On April 27, 1972, warrants were issued for the arrest of the petitioners for battery (Cal. Pen. Code § 242), and drawing or exhibiting a firearm (Cal. Pen.

Code § 417). Mr. Bay was also charged with carrying a concealed weapon (Cal. Pen. Code § 12025). These warrants arose out of attack by the petitioners on Mr. Alonzo Miller.

Later that day, at about 4:00 p.m., Sergeant Robert Farkas and other officers were in the vicinity of 1200 Lakeshore Avenue, Oakland. His purpose was to make arrests pursuant to these warrants (RT 4).[1] He saw a brown Mercury Brougham automobile being driven by Mr. Bay. Next to him was a young woman. Mr. Newton was seated in the rear seat (RT 7). Sgt. Farkas and Lt. Fugler were standing on the driver's side of the vehicle (RT 8, 28). They looked in the automobile and saw among other things a vinyl-type case, 18" by 12" (RT 15), on the floor of the car between Mr. Bay's feet (RT 8). Mr. Miller, the complainant and the victim in the original case, had told Sergeant Farkas that when he had been pistol-whipped, the weapon had been removed from a case of a similar color and shape (RT 14). Sergeant Farkas ordered Mr. Bay out of the automobile and then removed the case. As he removed the case, he could feel that it contained a bulky object inside which felt like a weapon. He lifted the flap and discovered a weapon inside (RT 14). It was a hand gun, blue-steel in color, with brown wooden grips (RT 17). It was a 9 mm. weapon. The clip was loaded. There was a round in the chamber (RT 18). The sergeant testified that he looked into the case since he was "ninety-nine and nine-tenths" sure there was a weapon in

[1]The respondent has obtained a copy of the reporter's transcript of the proceedings at the motion to suppress evidence and has lodged this with the Clerk of the Court.

there (RT 33).

ARGUMENT

I

THERE IS NO FINAL JUDGMENT. THE PETITION IS PREMATURE.

The petitioners invoke the jurisdiction of this Court under title 28, United States Code, section 1257 (3) (Pet., p. 2).[2] That statute provides that the writ of certiorari is available under circumstances therein outlined but only to review final judgments or decrees. 28 U.S.C. § 1257. The respondent submits that the order of the municipal court now sought to be reviewed is an interlocutory one only. It is not final. The petition is therefore premature and should be denied.

The petitioners quote California Penal Code section 1538.5(j) (Pet., Exh. E) which provides for an interlocutory appeal in misdemeanor cases from the order of a municipal court relating to the return of property seized and the suppression of evidence relating thereto. They then aver that such an appeal is binding on them (Pet., p. 3). The quotation is not complete. The last sentence of the statute at issue omitted from the excerpt quoted in Exhibit E goes on to read:

> "... . If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding on them." (Cal. Stats. 1967, ch. 1537, p. 3652, § 1)

This sentence clearly makes interlocutory appellate review binding on the People, but it does not purport to bind a defendant in a criminal case.

In *People* v. *Medina*, 6 Cal.3d 484, 99 Cal. Rptr.

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[2]The petitioner's reliance on 28 U.S.C. 28 1247(3) appears to be but a typographical error.

630, 492 P.2d 686 (1972), the California Supreme Court held in a felony case that the denial of a motion to suppress evidence under California Penal Code section 1538.5 and subsequent denial of an appellate writ without opinion was not a conclusive determination on the merits of a challenged search and seizure and did not preclude further review of that issue on appeal from an ensuing judgment of conviction. The respondent submits that the petitioners' Exhibit B does not reflect a decision on the merits. This ruling by the Appellate Department of Alameda County Superior Court is therefore not binding on them on their appeal from any judgment of conviction which they may suffer in the future.

The California Supreme Court went on to state even if, in the course of denying the petition for an interlocutory writ, a California appellate court did give full reasons in a written opinion after full oral argument, that denial is not res judicata. It pointed out that the statute permitted the defendant, as opposed to the People,[3] to seek further review of the validity of the search on appeal from the judgment of conviction, a concept totally at variance with the application of the doctrine of res judicata. *Medina*, *supra* at 492. At most, the interlocutory opinion of the reviewing appellate court may be considered the law of the case since the review is interim appellate review by writ in lieu of appeal. But, in applying this latter concept the California Supreme Court has abjured the lower courts to:

"....[K]eep in mind that 'the law of the case,

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[3]The respondent notes that under Penal Code section 1538.5 and the decisions of the California Supreme Court, a defendant's interests are protected to a greater extent than are those of the People. *People* v. *Superior Court*, 6 Cal.3d 757, 100 Cal.Rptr. 281, 493 P.2d 1145 (1972).

which is merely a rule of procedure and does not go to the power of the court, has been recognized as harsh, and will not be adhered to where its application will result in an unjust decision' [citation omitted]." *People* v. *Medina*, *supra*, at 492.

The respondent therefore respectfully submits that contrary to petitioners' conclusory statement, the ruling by the appellate department of the Alameda County Superior Court is not binding on them and there is no final order of the highest state court ripe for review. 28 U.S.C. § 1257.

But even if it be considered for the sake of argument that the interlocutory order of the appellate department be a final one, the case is not ripe for decision by this Court. It does not follow that because the evidence complained of is admitted that the petitioners will be convicted. The evidence against the petitioners has not been presented to a jury. There are questions of criminal knowledge, possession and control, and credibility. Very properly, the People are not aware of the direction which a presumably spirited defense will take, but it is certain that the petitioners have not yet pleaded guilty. Were the petitioners to concede that a finding of their guilt was inevitable and thus bind themselves to the position that in the event that the complained of evidence is ruled admissible on the present record, such a ruling would remove any defense they might have in a California trial court and that furthermore their right to appeal subsequent to conviction has been effectively removed, then perhaps such concessions[4] would effectively reduce further proceedings in this case to:

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[4]The constitutional propriety of such concessions would be doubtful absent precautions of the caliber deemed mandatory in *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

"...[A] few formal gestures leading inexorably towards a conviction, and then another appeal to the...[California] Court for it formally to repeat its rejection of . . . [the] constitutional contentions whereupon the case would wind its weary way back...as a judgment unquestionably final and appealable...." *Mills* v. *Alabama*, 384 U.S. 214, 217 (1966).

This is, however, not our case. To the contrary, there is, thus far, merely a pre-trial evidentiary ruling, though admittedly on a constitutional basis. It could be that a ruling favorable to the petitioners would make the People's burden of proof well nigh impossible to discharge, but it does not follow that an unfavorable ruling will necessarily result in a conviction. In effect, the petitioners seek two bites of the apple. This, the respondent submits, may well be understandable but it is hardly supportable. The respondent submits that full and binding review at this time would result in

"...a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets....[footnote omitted]" *Mills* v. *Alabama*, *supra* at 217, 218.

The respondent therefore submits that because the ruling sought to be reviewed is interlocutory, as such it is not properly before this Court.

II

THE SEIZURE OF THE SATCHEL AND OF THE HAND GUN IT CONTAINED WAS PROPER.

A. It was both incident to an arrest and in protection of the arresting officers.

The uncontraverted testimony is that the search took place contemporaneously with the arrest of Mr.

Bay and Mr. Newton pursuant to valid arrest warrants (RT 4). It will be recalled that the vinyl case was in plain view between petitioner Bay's feet. Moreover, the satchel was similar in color and shape to the one from which the gun was taken by Mr. Bay when he pistol-whipped his victim Mr. Alonzo Miller. Thus the case itself was known to the officer to be at once evidence of the crime of which Mr. Bay was charged and also, the container of a weapon carried by Mr. Bay. In *Chimel* v. *California*, 395 U.S. 752, 762, 763 (1969), this Court stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested to remove any weapons that the latter might use in order to resist arrest or effect his escape. Otherwise, the officers' safety might well be endangered and the arrest frustrated. In addition it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification therefore for a search of the arrestee's person and the area 'within his immediate control'-construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence."

The petitioners insist that "plain view" alone will not justify a search and that in any event the doctrine has no application to this case citing *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Though the interpreta-

tion of the rule of that case is not without difficulty, see *e.g.*, *North* v. *Superior Court*, 8 Cal.3d 301, ____ Cal. Rptr.____, ____ P.2d ____ (1972), it seems clear that under any interpretation of its effect, the plain view doctrine at the very least permits the seizure by an officer of evidence which he inadvertently discovers when he is where he has a right to be. *Id.*, plurality opinion at p. 466. On this point, even the dissenting opinion in *North* v. *Superior Court*, *supra* at 316, agrees. This is our case and the officers' actions were justified.

The respondent therefore submits that under the rule of *Chimel* v. *California*, *supra*, the seizure of the vinyl case was justified.

The petitioners rely on *United States* v. *Tate*, 209 F.Supp. 762 (D.C. Del. 1962), for the proposition that because Mr. Bay had been ordered out of the car, therefore the seizure of the vinyl case was not justified as being incident to an arrest. In *Tate* the defendant had been arrested for speeding and after offering resistance, was handcuffed and placed in the rear of a locked police car. The police officer made a general search of the automobile and found a shotgun beneath the front seat. In directing a verdict for the defendant, the Court held that "The searcher must have in mind some reasonably specific thing he is looking for and reasonable ground to believe it is in the place being searched. . . . ." *United States* v. *Tate*, *supra* at 765.

In reaching its decision, the district court noted that it was a speeding arrest, the police officer was not looking for means by which the crime had been committed, wasn't looking for weapons and didn't recognize the defendant as having a police record. Indeed the arresting officer was positive that the

arrestee could not escape nor get at weapons concealed in the automobile. Characterizing it as a "close case," the judge therefore ruled it was a general exploratory search.

Our case is very different. There was an arrest pursuant to warrant involving the use of a hand gun, the case was in plain view, it had been used in the original crime to contain a weapon and was evidence thereof and the petitioners were in fact known to the arresting officers to have criminal records. The respondent submits therefore that *Tate* is not controlling.

Closely allied to the petitioners ability to escape is the interest of self-protection for the officers making the arrest. The respondent notes that even where there is neither cause to search nor reason to arrest, there exists the right to protect oneself. Thus, a lesser intrusion known as a pat search is permissible where the officer has grounds to believe the detainee is armed. *Terry* v. *Ohio*, 392 U.S. 1 (1968). This interest is present in arrest situations as well as in "stop and question" situations. It was recognized in *Preston* v. *United States*, 376 U.S. 364 (1964), and cited with approval and replied upon in *Chimel* v. *California*, *supra* at 764. It was minimal in *United States* v. *Tate*, *supra*, because the arrestee had already been handcuffed and placed in a police car by the arresting officer.[5]

B. There was probable cause to search the case.

The petitioners had been stopped in the automobile. The arresting officer at the time of the stop approached the car and saw the vinyl case on the floor between Mr.

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[5]The respondent notes that the petitioners in their cross-examination at the hearing tried hard albeit unsuccessfully to bring themselves under the peculiar facts of *Tate*.

Bay's legs. It was in plain view. Up to this time there had not been any search. The officer knew that Mr. Bay and Mr. Newton had assaulted the victim, Mr. Miller, and that Bay had used a hand gun to pistol-whip Mr. Miller. He also knew that this hand gun had been taken by Mr. Bay from a case of similar shape and color. The respondent therefore submits that it was reasonable for the officer to believe that this vinyl case was not only evidence of a crime but also contained a hand gun. One reasonable inference surely is that Mr. Bay, who it may be noted was accompanying Mr. Newton once more, was in some way acting as Mr. Newton's bodyguard and was carrying a weapon concealed in violation of California Penal Code section 12025.

But even if there was not then probable cause to look inside the case the moment it was first seen by the arresting officer, there was certainly cause to search when the case was picked up. The officer could feel a bulky weapon-like object in it. In his own words, he was ninety-nine and nine-tenths sure it was a weapon.

The cases relied upon by petitioners are readily distinguishable. In *Preston* v. *United States*, 376 U.S. 364 (1964), it was a *later* search *not* incident to an arrest which was condemned because though there was initially cause to arrest there was not subsequently probable cause to search. Of course, if there is probable cause, a search of an automobile appears to be no longer necessarily defective if the automobile is taken from the point of stop to another and more convenient place for the actual search. *Chambers* v. *Moroney*, 399 U.S. 42, 52 (1970). There is no such movement in our case. The California case of *Mozzetti* v. *Superior Court*, 4 Cal.3d 699, 94 Cal. Rptr. 412, 484 P.2d 84 (1971), on which appellant also relies concerns itself to

an inventory listing of the contents of an impounded automobile and holds that sealed containers or compartments may not be entered in the course of such inventory absent cause. Such an impound and search is not at issue in our case. But even under *Mozzetti* if the impounding officer could properly lift up the container and then, because of what he felt, reasonably come to the conclusion that it contained contraband, then such contraband may be seized.

The petitioners appear to complain that because the officer was told on April 21, 1972, of the existence of the vinyl case and that Mr. Bay had taken the pistol from it, the officer should have obtained a search warrant to search the automobile (Pet., p. 11). The respondent notes that we are not faced with a general search of an automobile but with a search of a case. The officer had no pre-warning that the arrest would take place in an automobile. According to the petition (p. 11), it appears that the officers were waiting to serve the warrant in the vicinity of Mr. Newton's residence and, to quote the petitioners, "... . The fact that the arrest occurred while the petitioners were in the vehicle is entirely fortuitous ...." (Pet., p. 11). The respondent therefore submits that petitioners' point is not well taken. On these facts, no search warrant was required.

CONCLUSION

The petition is premature because it attempts to seek review of an interlocutory judgment and not a final one.

Both the vinyl case and loaded gun were evidence of the original crime and seized incidental to an arrest in the automobile. In any event there was probable cause to search the case once it was seen in plain view.

We therefore submit that the petition for certiorari be denied.

DATED: June 25th, 1973.

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